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No. 86-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JUDY WADDELL,

Appellant,

v.

THE PEOPLE OF THE STATE OF MICHIGAN,

Appellees.

On Appeal From The Circuit Court For The County Of Berrien, State Of Michigan

---

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Is the Michigan criminal statute relating to compulsory school attendance under which the appellant was arrested, jailed, tried, convicted, and fined unconstitutional as inflexibly applied to appellant despite her sincere religious belief, in accordance with the teachings of the Seventh-day Adventist Church, that formal schooling of her six-year-old son should be temporarily delayed?

In particular,

A. Is the statute unconstitutional as applied in the face of a religious objection only where beliefs are "fundamental tenets" of a recognized church shared by all members of that church?

B. Is the statute unconstitutional as applied only when it burdens beliefs "vital to the survival of the Seventh-day Adventist faith"?

C. In weighing the constitutionality of a statute, are the strict standards of *Sherbert* v. *Verner* applicable only to the denial of economic benefits?

2. Is the Michigan compulsory school attendance law unconstitutional on its face or as applied in violation of the Fourteenth Amendment Due Process Clause because it creates a presumption that all children of the age of six are ready for school without giving the appellant a chance to rebut that presumption with evidence of the harm formal schooling would cause her immature child?

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INTRODUCTION

Appellant Judy Waddell, a/k/a Judith Waddell appeals from the judgment below, that being an Order on Appeal entered by the Circuit Court for the County of Berrien, Michigan, on January 31, 1986, which held that the Michigan compulsory school attendance statute, was not, on its face or as applied, repugnant to either the Free Exercise Clause of the First Amendment to the United States Constitution made applicable to the States by reason of the Fourteenth Amendment to the United Constitution or the Due Process Clause of the Fourteenth Amendment. The appeal to the State circuit court was from a misdemeanor criminal conviction in Michigan's Fifth Judicial District Court where appellant, by a motion to dismiss, specifically drew into question the validity of Michigan's compulsory school attendance statute on the grounds that it was repugnant to the Constitution of the United States. The Michigan Court of Appeals and the Michigan Supreme Court denied appellant's applications for leave to appeal. This jurisdictional statement is submitted to show this Court has jurisdiction of this appeal and that a substantial question is involved.

OPINION BELOW

The opinion of the Circuit Court for the County of Berrien, Michigan, on appeal from the district court, entered on January 17, 1986, has not been reported and is reprinted at page A1 - A14. The circuit court's order on appeal dated January 31, 1986, which is the final judgment here appealed from has not been reported and is reprinted at pages A15 - A17. The opinion of the Michigan Fifth Judicial District Court (State misdemeanor trial court) entered on September 1, 1983, was not reported and is reprinted at page A18 - A22. The order denying defendant's motion to dismiss and finding appellant guilty of

of violating the compulsory school attendance statute from which the appeal to the Berrien County Circuit Court previously referred to was taken has not been reported and is reprinted at page A23 - A24. The Michigan Court of Appeals order denying defendant's application for leave to appeal entered on August 18, 1986, has not been reported and is reprinted at page A26. The Michigan Supreme Court's order denying defendant's application for leave to appeal entered on February 10, 1987, is not reported and is reprinted at page A25.

JURISDICTION

This appeal is taken from an Order on Appeal entered by a Michigan State court, the Berrien County Circuit Court, entered on January 31, 1986 (A15 - A17). The State Circuit Court, acting in its appellate capacity, reviewed the decision of the Fifth Judicial District Court in a misdemeanor criminal case in which the appellant was charged, convicted, and sentenced for violating the State's compulsory school attendance laws. Her defense was based entirely on a constitutional challenge under the Federal Constitution. The State Circuit Court upheld the conviction and directly ruled on appellant's constitutional claims.

The appeal in this case is brought pursuant to 28 U.S.C. § 1257(2) as an appeal from a final judgment rendered in a criminal case by the highest court of a State in which a decision could be had and whereby there is drawn into question the validity of a statute of the State on the ground that it is repugnant to the Constitution of the United States, and the decision was in favor of its validity. The jurisdiction of the Supreme Court to hear this appeal therefore properly rests on 28 U.S.C. § 1257(2).

Appeal under 28 U.S.C. § 1257(2) is proper not only when challenging the constitutionality of a statute on its face but also when challenging the statute as applied. *Cohen* v. *California*, 403 U.S. 15, 17-18 (1971); *Warren Trading Post Co.* v. *Arizona Tax Commission*, 380 U.S. 685, 686 (1965); *United States* v. *Christian Echoes National Ministry*, 404 U.S. 561, 563 (1972). The Order on Appeal of the Berrien County Circuit Court is a judgment from the highest court in which a decision can be had due to the fact that review by the Michigan Court of Appeals and thereafter review by the Michigan Supreme Court are both discretionary. Since both the Michigan Court of Appeals and the Michigan Supreme Court have declined to exercise their authority, although review in both courts was properly sought, the judgment of the Berrien County Circuit Court not the denial of appellant's application for leave to appeal to the Michigan Court of Appeals or the Michigan Supreme Court is the judgment reviewable under 28 U.S.C. § 1257. *Williams* v. *Florida*, 399 U.S. 78, 80, n.5 (1970); *Minneapolis, S.T.P. & S.S.M. Ry. Co.* v. *Rock*, 279 U.S. 410 (1929).

On May 7, 1987, a Notice of Appeal to the Supreme Court of the United States was filed with the Clerk of the Circuit Court for the County of Berrien, Michigan, which is the court from which this appeal is taken (A27). A copy of said Notice was also filed with the Clerk of the Fifth Judicial District Court (A29). The Notice of Appeal was accompanied by Proof of Service on all parties required to be served (A28).

This appeal has been filed and docketed within 90 days of the denial of appellant's application for leave to appeal by the Michigan Supreme Court, said denial having been entered by the court on February 10, 1987. Appellant in this case sought discretionary review by both the Michi-

gan Court of Appeals and the Michigan Supreme Court and thus has satisified the requirement that the judgment appealed from be of the highest court in which decision can be had. *Stratton* v. *Stratton*, 239 U.S. 55 (1915); *Matthews* v. *Hue*, 269 U.S. 262, 265-266 (1925); *Banks* v. *California*, 395 U.S. 708 (1969); *Benton* v. *Maryland*, 395 U.S. 784, 786 (1969).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions and statutes that this case involves are the First Amendment to the United States Constitution, the Fourteenth Amendment to the United States Constitution, and the Michigan compulsory school attendance law under which the appellant was prosecuted, § 731 and § 732 of the Michigan School Code of 1955, as amended, M.C.L. § 340.731 and § 340.732; M.S.A. § 15.3731 and § 15.3732. The Michigan compulsory school attendance law has been recodified without substantive change as M.C.L. § 380.1561; M.S.A. § 15.41561. The constitutional provisions and the Michigan statute, both as it existed at the time of appellant's prosecution and as it has since been recodified, are set out verbatim in the Appendix herein at A42 - A45.

STATEMENT OF THE CASE

A. The Proceedings Below In Which The Federal Questions Were Presented.

In January of 1975 a criminal complaint was issued by the Berrien County Prosecutor's office subsequent to a complaint having been filed by the Berrien County, Michigan, Public Schools charging appellant Judy Waddell with violating the State's compulsory school attendance stat-

ute. She was subsequently arrested and jailed until she was able to make bond.

Prior to the commencement of the trial, appellant filed a motion to dismiss (amended twice) praying that § 731 and § 732 of the Michigan School Code of 1955 be determined to be unconstitutional under the Free Exercise Clause of the First Amendment as well as the Due Process Clause of the Fourteenth Amendment (*see* I Tr 1-2). A copy of appellant's second amended motion to dismiss setting forth appellant's federal constitutional claims is reprinted in the Appendix at A30 - A31. Also prior to trial appellant filed a motion in limine based on *Sherbert* v. *Verner*, 374 U.S. 398 (1963), and *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), raising the question as to burden of proof and burden of going forward with the evidence when First Amendment issues are at stake. The district court entered a bench opinion granting the motion in limine and setting forth the burdens to be carried by the prosecutor and the appellant under the free exercise tests of this Court in connection with the contemplated hearing on appellant's motion to dismiss (I Tr 4-8).

After a 16-day evidentiary hearing with both the State and the defense presenting expert testimony in connection with appellant's motion to dismiss which was based solely on appellant's claim that the Michigan compulsory school attendance statutes are unconstitutional under the First and Fourteenth Amendments to the Constitution (I Tr 110-XVII Tr 2349), the parties again specifically addressed the federal constitutional claims in post-hearing motions and responses (A35 - A36; A37 - A41). Briefs were subsequently filed which exclusively focused on appellant's constitutional challenge. The Fifth District Court on September 1, 1983, entered an order denying appellant's constitutionally based motion to dismiss and

sustaining the validity of the State statute and by reason thereof found appellant guilty of violating the State compulsory school attendance statutes (A23 - A24).

On March 20, 1984, the district court entered its sentence against appellant ordering her to pay a fine in the amount of $50.00, State costs of $5.00, and additional costs of $1,000.

Timely appeal as of right was taken by appellant to the Circuit Court for the County of Berrien, Michigan, in accordance with the provisions of § 8342 of the Michigan Revised Judicature Act; M.C.L. § 600.8342; M.S.A. § 27A.8342. The appeal focused upon appellant's constitutional defense raised in the trial court. After receiving briefs on the constitutional issues, the circuit court entered its opinion on the appeal on January 17, 1986 (A1 - A14). In the circuit court's opinion the court affirmed the conviction of the appellant addressing its opinion primarily to appellant's federal constitutional claims but reversing the trial court's assessment of additional costs of $1,000 noting that the case dealt with "the claim of constitutional conflict between the free exercise of religion and the state's rights in compulsory education." Thereafter the court entered its order on appeal on January 31, 1986 (A15 - A17), which is the judgment appellant seeks to have this Court review.

An application for leave to appeal the circuit court's order on appeal was timely filed by appellant with the Michigan Court of Appeals seeking "a reversal of her conviction by the Fifth District Court and a determination that the state's compulsory school attendance statutes are unconstitutional or, in the alternative, unconstitutional as applied to her under the facts in this case." The questions presented on appeal specifically

raised appellant's federal constitutional claims. Under § 308(2)(a)(ii) of the Michigan Revised Judicature Act; M.C.L. § 600.308(2)(a)(ii); M.S.A. § 27A308(2)(a)(ii) only discretionary review is provided for and permitted in the court of appeals where an appeal is sought from a misdemeanor conviction in the district court. On the 18th of August, 1986, the Michigan Court of Appeals entered an order denying the application for leave to appeal (A26).

Thereafter, an application for a leave to appeal the circuit court's Order on Appeal and the court of appeals order denying the application for leave to appeal was timely filed with the Michigan Supreme Court. The application for leave to appeal again specifically raised in its questions presented the constitutional cliams raised at the trial court and preserved on appeal. Under M.C.R. §§ 7.301 and 7.302 only discretionary review is permitted and provided for in the State Supreme Court. On February 10, 1987, the Michigan Supreme Court, after considering said application for leave to appeal, entered its order denying said application "because we are not persuaded that the questions presented should be reviewed by this court." (A25).

B. Material Facts Relating To Appellant's Constitutional Claims

Michigan's compulsory school attendance law, M.C.L. § 340.731 and § 340.372; M.S.A. § 15.3731 and § 15.3732, requires that parents begin sending their children to school when the child reaches the age of six. Appellant, pursuant to sincerly-held religious beliefs, wished to delay the start of her six-year-old son's formal schooling. Appellant emphasizes that she never sought a complete exemption from the compulsory education requirements. She and her church have a high regard for formal educa-

tion. The Seventh-day Adventist Chruch has the second largest parochial school system in the world. Appellant merely sought to delay her son's entry into school until he had the physical, mental, and emotional maturity of the average student starting school.

Appellant's beliefs were based on the historic teachings of Ellen G. White, a church prophet and founder of the Seventh-day Adventist Church. Mrs. White frequently addressed the issue of when children should begin formal schooling in her extensive writings on the education of children. Mrs. White believed that parents, especially mothers, had a sacred duty to be the first teacher of their children and that parents shirked this duty if they sent their children off to school at too early an age. One of the quotes from her writings most familar to Adventists reads, "For the first eight or ten years of a child's life the field or garden is the best schoolroom, the mother the best teacher, nature the best lesson book." *Education*, p. 208 (1903) (Def. Ex. R) Mrs. White warned of the dangers of exposing children to vice in public schools before they have been properly formed by their parents. *See*, e.g., *Christian Temperance and Bible Hygiene*, pp. 67-68, reprinted in *Fundamentals of Christian Education*, pp. 156-157 (Def Ex. P). The possible harm to the physical and mental health of the child that can result from forced school attendance at too early an age is a frequent concern expressed in Mrs. White's writings.[1]

There do exist differences within the Seventh-day Adventist faith over the proper interpretation of Mrs.

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[1] Due to a belief that the body is the temple of God, many of the teachings of Mrs. White and the Seventh-day Adventist Church emphasize good health. The church's dietary laws against the consumption of meat, caffeine, and alcohol are health based. The Adventists operate an extensive health-care ministry.

White's teachings in this area. Some believe that no child should begin school until age eight. Others believe each child's physical, mental, and emotional maturity should be evaluated to determine when he is ready for formal schooling. The appellant holds to this second interpretation.

In accordance with her beliefs, the appellant had her son tested at the Education and Counseling Department of Andrews University, a Seventh-day Adventist institution (I Tr 131-132). She also consulted an Adventist pediatrician for a preschool examination in August of 1974 (II Tr 219-220). Officials at the University and the pediatrician concurred with appellant's assessment that her son was not ready for school at age six because of his slow physical and emotional maturation (II Tr 207, 355).

The appellant asked Dr. Habenicht, the pediatrician, for a statement that she could take to the school board to excuse her son from classes. Dr. Habenicht declined because he knew the law allowed for no such exceptions (II Tr 219-220). Dr. Habenicht further testified that as of May, 1975, when Brett was seven years old, he was then at the 50th percentile for his weight and height as compared to six-year-olds with whom he would be associating if he began school in the Fall of 1975 when he would be eight years old (III Tr 378).

Acting on her religious convictions, appellant did not send her child to school at age six and informed the school authorities of her reasons (I Tr 157; II Tr 164). Appellant asked the superintendent if there was any way she could keep her son out of school and still obey the law. The superintendent said there was not and would not tolerate an exception since her son was passed the age of six and was required by law to be in school (IV Tr 588, IX Tr

1522-1523). For her actions she was arrested, jailed, tried, convicted, and fined. At the hearing on her motion to dismiss appellant presented testimony of church officials that her actions "closely follow[ed]" church teachings (III Tr 456; IX Tr 1221-1222).

Appellant also presented testimony that the Andrews University Elementary School, where she planned to, and did, enroll her son in the Fall of 1975, allowed for acceleration in studies to allow Adventist students starting later, in accordance with church teachings, to progress more quickly. She also produced expert testimony that children who start school later learn more rapidly and soon catch up with their chronological peers (III Tr 380, 386, VIII Tr 1022, 110-114, 1610-1612).

The appellant also presented several nationally renowned experts on education.[2] These experts testified that children mature at different rates and that there was no empirical evidence that all children of age six were ready to begin school (VII Tr 886, 890-895; IX Tr 1084-1086). The experts also expressed the opinion that children could be permanently harmed by being forced into the school system before they are ready (V Tr 661-667; VII Tr 907-908; IX Tr 108).

Not only did the State's expert witnesses not contradict the fundamental thrust of the appellant's experts, they all concurred that all children should not be inflexibly forced

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[2] Donald A. Ericson, Professor of Education at Simon Fraser University at Burnaby, Vancouver, British Columbia (Dr. Ericson's testimony in *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), was noted by this Court); Dr. Joseph W. Holliwell, Professor in the Department of Education, Administration, and Supervision at St. John's University; Dr. William Ludlam, Associate Professor at Pacific University College of Optometry.

to begin school at a set chronological age (VIII Tr 1877-1878; XV Tr 2056). Even the superintendent agreed on cross-examinaiton that exemptions to the compulsory attendance laws should be permitted (IX Tr 1500, 1515-1520, 1535-1552). Finally, the appellant introduced a chart showing the many variations in the ages for compulsory school attendance among the States (Def. Ex. W, reproduced in the Appendix at 46). The chart shows that many States do not require attendance until age seven or eight. It also shows that Michigan has amended its law to consistently lower the age of required attendance.

THE QUESTION IS SUBSTANTIAL

This case presents the question of whether an inflexible state compulsory school attendance statute is unconstitutional on its face or as applied in the face of a conflicting claim under the Free Exercise Clause. At issue is whether application of the law which allows no exception for a temporary delay in starting school is unconstitutional in the absence of evidence that the State's interest in education will thereby be impaired.

I. THIS CASE PRESENTS SUBSTANTIAL QUESTIONS REGARDING A WIDESPREAD MISINTERPRETATION GIVEN TO THIS COURT'S FREE EXERCISE DECISIONS WHEN EVALUATING THE CONSTITUTIONALITY OF STATE STATUTES

The interest asserted by the appellant in this case is at the confluence of two fundamental rights. In holding that the interest of the State asserted in this case overrode the appellant's rights, the courts below so distorted the body of case law on the First Amendment Free Exercise Clause that much of it was rendered meaningless. As interpreted by the lower courts, *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), would not afford protection to anyone but

the Amish. The test enunciated by the Court in *Sherbert* v. *Verner*, 374 U.S. 398 (1963), was construed to apply only to economic benefits, thereby giving statutory benefits greater protection than fundamental rights. Also, the lower courts' analyses gave greater constitutional status to corporate denominational doctrine than to matters of individual conscience, contrary to the teachings of *Thomas* v. *Review Board*, 450 U.S. 707 (1981).

The Michigan compulsory school attendance law infringed upon the appellant's right to the free exercise of religion and her right to direct the upbringing of her child. This Court has long recognized the fundamental nature of a parent's right to raise her child. In *Stanley* v. *Illinois*, 405 U.S. 645 (1972), the Court reviewed its holdings in this area:

> The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed "essential," *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1923), "basic civil rights of man," *Skinner* v. *Oklahoma*, 316 U.S. 535, 541 (1942), and "[r]ights far more precious. . . than property rights," *May* v. *Anderson*, 345 U.S. 528, 533 (1953). "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince* v. *Massachusetts*, 321 U.S. 158, 166 (1944).

Id. at 651. In *Yoder*, the Court said, "When the interests of parenthood are combined with a free exercise claim. . . more than merely a 'reasonable relation to some purpose within the competency of the State' is required to sustain the validity fo the State's requirement under the First Amendment." 406 U.S. at 233.

A. The Standards Of *Sherbert* Should Not Be Limited To The Denial Of Economic Benefits.

In *Sherbert* v. *Verner*, 374 U.S. 398 (1963), this Court enunciated a test to be used in balancing the interests of the State with those of an individual acting in accordance with the dictates of his or her religious beliefs. The Court ruled that State laws burdening the free exercise of religion must be justified by a compelling State interest, "no showing merely of a rational relationship to some colorable State interest would suffice." *Id.* at 406. Further, the State must "demonstrate that no alternative forms of regulation would [accomplish the State's interest] without infringing First Amendment rights." *Id.* at 407. This Court recently reaffirmed that *Sherbert's* compelling stat interest/least restrictive means test is the touchstone of free exercise jurisprudence in *Hobbie* v. *Unemployment Appeals Commission*, 480 U.S. ____, 94 L.Ed.2d 190 (1987).

In *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), this Court said:

> The essence of all that has been written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.

Id. at 215. Despite this language in *Yoder* paralleling the language in *Sherbert*, followed with a citation to *Sherbert*, both courts below rejected this standard as inapplicable to the present case. The circuit court on appeal below ruled that *Sherbert's* compelling state interest/least restrictive means test applied only in cases involving economic benefits. To apply the exacting standards of *Sherbert* to the denial of economic benefits but a simple balancing test when the burden on free exercise is in the form of

criminal sanctions defies logic and elevates statutory benefits to a higher constitutional plane than basic freedoms.

B. *Yoder* Does Not Call For The Evaluation Of The Contents Of Religious Beliefs Undertaken Below.

In *Yoder*, the Court directly addressed a conflict between religious beliefs and a compulsory school attendance law. The Court ruled:

> We can accept it as settled, therefore, that, however strong the State's interest in universal compulsory education, it is by no means absolute to the exclusion or subordination of all other interests.

406 U.S. at 215. The Court recognized the "paramount responsibility" of the State to educate its citizens, *id.*, at 213, but explained that the State faced the further burden of proving that its interests would not be served by the exception to the law sought by the Amish.

> [D]espite its admitted validty in the generality of cases, we must searchingly examine the interests that the State seeks to promote by its requirement for compulsory education to age 16, and the impediment to those objectives that would flow from recognizing the claimed Amish exemption.

Id. at 221.

Rather than applying these principles to the facts of this case, the courts below engaged in an improper comparison of the importance of the religious belief asserted in *Yoder* with that asserted by the appellant and found the appellant's admittedly sincere belief wanting. Not only is this analysis a misinterpretation of *Yoder*, the inquiry undertaken is improper under this Court's Establishment Clause teachings in *Presbyterian Church* v. *Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969), and *Ser-*

bian Easteran Orthodox Diocese v. *Milivojevich*, 426 U.S. 696 (1976).

Unfortunately, the courts below are not alone in their reading of the *Yoder* decision as being dependent upon the uniqueness of the Amish belief and way of life. *See*, e.g. *Duro* v. *District Attorney, Second Judicial District of North Carolina*, 712 F.2d 96, 98 (4th Cir. 1983), *cert. denied*, 465 U.S. 1006 (1984); *Burrow* v. *State*, 669 S.W.2d 441, 443-444 (Ark. 1984); *Howell* v. *Texas*, 723 S.W.2d 755 (Tex App. 1986); *Jernigan* v. *State*, 412 So.2d 1242, 1244 (Ala. Crim. App. 1982); *State* v. *Riddle*, 285 S.E.2d 359, 361-362 (W.Va. 1981). An analysis that focuses on the content of the belief involved and not on the State's ability or inability to achieve its compelling interest without burdening the free exercise of religion puts the court on a slippery slope leading to the judging of religious beliefs that this Court warned against in *United States* v. *Ballard*, 322 U.S. 78 (1944).

C. The Courts Below Should Not Have Given Individual Beliefs Less Protection Than Denominational Doctrine.

Both courts below found appellant's belief to be religiously based and sincere. In comparing the asserted belief of appellant with those put forth in *Yoder*, the courts below found that the appellant's belief was not "central" and "fundamental" to the Seventh-day Adventist Church. (District Court Opinion at 3, (A21) Circuit Court Opinion at 8). The circuit court, on appeal, found:

> Although found in Mrs. White's [a prophet of the church] teachings, the belief expressed by the Defendant-Appellant is not shared by all Adventists. It is a matter of individual's conscience. It is not like the Amish in *Yoder, supra*, vital to the survival of the Seventh Day [sic] faith.

(Slip Opinion at 8) (A8.)

It was for these reasons that both courts found that the appellant's belief did not deserve the protection afforded those of the Amish in *Yoder.* In *Thomas* v. *Review Board*, 450 U.S. 707 (1981), the Court rejected similar analysis by the Indiana Supreme Court.

> The Indiana Court also appears to have given significant weight to the fact that another Jehovah's Witness had no scruples about working on tank turrets; for that other witness, at least, such work was "scripturally" acceptable. Intrafaith differences of that kind are not uncommon among followers of a particular creed, and the judicial process is singularly ill equipped to resolve such differences in relation to the Religion Clauses. . . . [T]he guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect. Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.

Id. at 715-716.

Had the courts below followed the proper analysis in this case, they would have determined whether the State had shown that the interests served by the compulsory education law would have been thwarted by the limited exception sought by the appellant. The Court in *Yoder* undertook just such an inquiry. In this case, the appellant has no quarrel with the State's desire that her child receive a full, formal education. Both the appellant and her church firmly believe in a formal education. But appellant also believes, in accordance with the teachings of her church, that the parent is the child's first teacher with a duty to teach the child in preparation for his formal

education and that she would fail in her sacred duty if she sent her son to school before he was prepared.

Beyond recognizing a generally compelling interest in education, the courts below never discussed, and the State never asserted, a particular interest served by the inflexible application of the rule requiring formal schooling to begin at age six. This is understandable in view of the fact that the State's own expert testified that an exception such as that sought by the appellant should exist. Yet, this is exactly the type of particularized interest the State is required to demonstrate. "A compelling interest is not just a general interest in the subject matter but the need to apply the regulation without exception to attain the purpose and objectives of the legislation." *State* v. *Yoder*, 182 N.W.2d 539, 542 (Wis. 1971).

II. THE IRREBUTTABLE PRESUMPTION CONTAINED IN THE MICHIGAN COMPULSORY SCHOOL ATTENDANCE LAW IS CONTRARY TO FACT AND IMPEDES THE STATE'S OWN INTERESTS AS WELL AS IMPAIRING FUNDAMENTAL RIGHTS.

In *Stanley* v. *Illinois*, 405 U.S. 645 (1972), this Court held that the Due Process Clause of the Fourteenth Amendment prohibited the State of Illinois from terminating the parental rights of an unwed father based on a presumption that unwed fathers were unfit to have custody of their children without giving the father a hearing to rebut that presumption. In this case, the State of Michigan has determined that children should begin formal schooling at age six. The presumption is that all children are ready and able to handle formal schooling at that age. The Michigan compulsory school attendance law does not provide any mechanism by which a parent can demonstrate that his/her child is not ready for formal

schooling and that the best interest of the child will be served by delaying the start of formal schooling.

The legitimacy of the State's ends are not questioned, the means chosen to achieve those ends are. The State does not serve its asserted interest by forcing a child to attend school before he is ready when the child's educational progress will be harmed by so doing. *See, Stanley,* 405 U.S. at 652.

Due process of law does not require a hearing in every instance of government impairment of a private interest. *Cafeteria Workers* v. *McElroy,* 367 U.S. 886, 894 (1961).

> "[W]hat procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by government action."

Stanley, 450 U.S. at 650-651, quoting *McElroy,* 367 U.S. at 895. As has been pointed out, the private interests impaired are paramount. The government function is the imposition of a criminal penalty. When the ultimate type of sanction a government can impose is brought to bear in an area of fundamental rights, the requirements of due process should be at their highest.

The irrebuttable presumption made by the State is not supported by empirical evidence and is often contrary to fact and therefore lacks critical ingredients of due process. *United States Department of Agriculture* v. *Murry,* 413 U.S. 508, 514 (1973); *Vlandis* v. *Kline,* 412 U.S. 441 (1973). Irrebuttable presumptions at issue in *Vlandis* and *Murry* were found unconstitutional even though the government function was the distribution of economic benefits, and the private interests impaired were not fundamental in nature.

III. GUIDANCE FROM THIS COURT WILL AID LEGISLATIVE SOLUTIONS IN THIS AREA OF GROWING CONFLICT AND PREVENT THE NECESSITY FOR *AD HOC* JUDICIAL RESOLUTION OF CONFLICTS.

Nowhere does the average citizen come into direct contact with the State more frequently than with the public school system. Increasingly, parents are voicing religiously based objections to State regulations and policies in this area. Parents espousing various fundamentalist doctrines feel religiously compelled to teach their children at home. Others have voiced objections to the content of public school curricula. *See*, e.g., *Mozert* v. *Hawkins County Public Schools*, 647 F.Supp. 1194 (E.D. Tenn. 1986).

Some States have responded to the home school movement with various legislative accommodations. Others have not. *See*, e.g., Va. Code § 22.1-257;[3] Tobak and Zirkel, *Home Instruction: An Analysis of the Statutes and Case Law*, 8 U. Dayton L. Rev. 1 (1982); Devins, *A Constitutional Right to Home Instruction?*, 62 Wash. U.L.Q. 435 (1984). Similarly, some States have adopted legislative provisions for individual evaluations of readiness for school. *See*, e.g., Hawaii Rev. Stat. § 289-9(4),[4]

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[3] The Virginia statute reads in pertinent part: "A school board: * * * 2. Shall excuse from attendance at school any pupil who, together with his parents, by reason of bona fide religious training or belief, is conscientiously opposed to attendance at school."

[4] The Hawaii statute reads in pertinent part: "Such attendance shall not be compulsory in the following cases: (1) where the child is physically or mentally unable to attend school (deafness and blindness excepted) of which fact the certificate of a duly licensed physician shall be sufficient evidence; * * * (4) where, upon investigation by the family court, when feasible, or by the district judge, it shall be shown that for any other reason the child may properly remain away from school."

Ohio Rev. Code Ann. § 3321.04(A)(1).[5]

Both in States that have not included flexible provisions in their attendance laws and in some that have, a tremendous amount of litigation, both in State and Federal courts, has been generated by these conflicts.[6] The widespread misunderstanding of this Court's decision in *Wisconsin* v. *Yoder* noted above has had the practical effect of negating the only guidance available from this Court in this area. This case, with its well-developed record on the appellant's religious beliefs and the impact of the requested exception on the State's educational goals, presents an excellent opportunity to give guidance in this area to courts and, more importantly, State legislatures. With clear standards on the balancing needed between the State's interests in education and the religious concerns of parents, legislatures will be better equipped to ensure that compulsory school attendance laws show the necessary sensitivity to First Amendment values. This will prevent courts from having to resolve many of these conflicts on an *ad hoc* basis.

It is important to bear in mind that a legislative determination that all children should receive an education is not a determination that the State knows best how to go about imparting that education. This Court has stated:

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[5] The Ohio statute reads in pertinent part: "The superintendent . . . may excuse him from attendance . . . upon satisfactory showing of either of the following facts: (1) that his bodily or mental condition does not permit his attendance at school . . .; this fact is certified in writing by a licensed physician or, in the case of a mental condition, by a licensed physician, a licensed psychologist, licensed school psychologist or a certified school psychologist."

[6] A preliminary Westlaw search reveals 44 cases involving home schooling.

> The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children. . . . The statist notion that governmental power should supersede parental authority in *all* cases because *some* parents abuse and neglect children is repugnant to American tradition.

Parham v. *J. R.* 442 U.S. 584, 602-603 (1979) (emphasis in original).

CONCLUSION

Appellant requests that the Court note probable jurisdiction and grant a plenary hearing.

Respectfully submitted,

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APPENDIX

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF BERRIEN

File No. 84-740 AR W

PEOPLE OF THE STATE OF MICHIGAN, *Plaintiff*

v.

JUDITH WADDELL, *Defendant*

OPINION ON APPEAL FROM FIFTH DISTRICT COURT

Pursuant to a warrant dated January 14, 1975, Defendant was arrested on the misdemeanor charge of failing to send her child, Brett Wadell, then age 7, to school during the period September 8, 1974, to January 14, 1975. She was arraigned January 16, 1975.

On or about March 26, 1975, Defendant filed a motion to dismiss (amended twice thereafter to add additional defenses) alleging, in brief, primarily that she did not send Brett to school "because of strongly held convictions;" "that the statutory requirements were unconstitutional" and, Defendant was being "unconstitutionally discriminated against." She also challenged the requirement that six year olds attend school as having no rational basis. On May 9, 1975, the People answered the motion. Evidence on this motion evidently was postponed until after the trial and the Court's rulings on Defendant's motion in limine.

Defendant's non jury trial was completed in one day, September 30, 1975. The Court deferred its verdict until after a hearing on Defendant's motion to dismiss, which hearings commenced September 30, 1975, and continued for 17 sessions from September 30, 1975, to October 20, 1976.

Following the hearings on the motion to dismiss the case continued at a slow, very slow, pace. This is well illustrated in a review of proceedings below from the settled record.

Various pleadings and motions were filed and extensions of deadlines granted by the District Judge. The Court finally did order, after approving yet another extension to January 27, 1978, for filing briefs on the motions to dismiss, that oral arguments be held March 7, 1978. It isn't clear that oral arguments were then held because the parties again stipulated that this deadline for briefs be extended from January 27, 1978, to April 6, 1979. That deadline wasn't met either because on June 12, 1979, the Court again granted a further 30 day delay for these briefs, presumably to July 10, 1979, and again on July 10, 1979, the Court approved another stipulation to extend the deadline 30 days, almost three full years after the last of the evidentiary sessions on the motions to dismiss, and more than four years after Defendant's arrest.

From the docket entries or in the record on appeal it is not established when the briefs were finally filed or whether or not oral arguments were had below.

In any event, there is a hiatus in the record from August 10, 1979, to September 1, 1983 (more than four years) when the District Judge finally filed his opinion denying Defendant's motion to dismiss (originally filed, as noted above, May 9, 1975).

After a passage of six more months, on March 20, 1984, Defendant was sentenced to a fine of $50, costs of $1,000 and state costs of $5.00. This was more than nine years after her arrest and eight years after her trial.

Defendant filed a Claim of Appeal of Right to this Court on the date of said sentencing.

The Michigan Court Rules then applicable, GCR 1963, 701.6 (a) required that within 30 days after filing the claim of appeal, the appellant shall file with the Court the record on appeal. Since the transcripts were done and available in 1977, or earlier, this was no difficult task and they were filed by appellant on April 19, 1984.

The Rule (section .6 (b)) then put the obligation on the trial judge to insure that all docket entries of the clerk, all exhibits

all pleadings, opinion, etc. are correct and ready for transmittal; to check the appeal bond and sign an order transmitting this record to the Circuit Court following which the clerk notifies the parties of the transmittal. The doing of these duties should reasonably be completed in 60 days or less with any diligence. It is only when such transmittal is made that the Circuit Court is in position to act on the merits of the appeal.

For reasons not in the record before this Court, the order settling the record on appeal was not signed by the District Judge until July 31, 1985, and then the records were sent by the District Court to the Circuit Court file room, more than a year after it reasonably should have been done. Neither counsel filed any motion with the Circuit Court or the Court below to expedite the sending of the settled record.

This Court is informed that on several occasions during that year circuit employees made inquiry as to when the settled record on appeal would be received. This was done apparently to avoid the embarrassment to the Court below of a superintending control order from this Court. These efforts apparently didn't work for a year.

The undersigned, sitting on this Circuit Court by assignment of the Supreme Court to take over the docket and cases of Circuit Judge White, received the filed for appellate review in November, 1985. This Court ordered oral argument for January 2, 1986, and as late as the afternoon of December 31, 1985, received for study a supplement to Defendant's breif!

This case is distinguished by its delay almost as much as its constitutional issues.

The Supreme Courts of the United States and of Michigan, and the public itself, have been vocal, especially in recent years, in their criticism of the trial Bench and Bar for delay in prompt disposition of litigation, particularly, as here, of criminal cases.

This case, unfortunately, adds fuel to the fires of such criticism and justification for it. The case is finally to be disposed by this opinion, eleven full years after it commenced. The seven

year old boy now 18; is a young man eligible to vote; and the Court is pleased to note, from the oral arguments, attending college.

The trial Bench and the Bar (who are officers of the Court), each have the duty to promptly dispose of litigation. Both Bench and Bar have the means to move a case. If attorneys on one side are delaying, those on the other side have the duty to complain to the Court. If both sides are delaying, the trial Court must insist on promptness at the risk of default of one side or dismissal of the case. Just as counsel should be prompt in disposing their cases, so also should the trial bench in its opinions and judgments. The older a case, the more queries and deadlines must be made by the trial Court who has the means and disciplinary power to insure promptness by counsel.

Now to the grounds for this appeal:

Defendant's son, Brett, was according to witnesses small for his size, hyperactive; had possible eye difficulties; had urinary frequency and slowness of development which Defendant mother felt would interfere with his adjustment in school.

The pediatrician for the boy, while sympathetic to these complaints, refused when requested by Defendant to certify that Brett was not able to attend school. Nor would a examing psychologist so find.

Defendant claims that her refusal to send Brett to school was based on her religious beliefs expressed by Ellen G. White, a 19th century prophetess of the Seventh Day Adventist Church.

At final arguments counsel for the Appellant-Defendant agreed the only issue on appeal is whether the Defendant's religious freedom is violated by the Michigan Compulsory Education Laws.

The Michigan law applying to the issue here involved, i.e., compulsory education of children is found at MCL 380.1561 formerly 340.731; MSA 15.41561, formerly MSA 15.3731 which provides that every parent of a child from the age of 6 to the

child's 16th birthday, shall send the child to the public schools during the entire school year.

The same statute provides reasonable accomodations by the exceptions to this requirement, two of which Defendant could have availed herself.

The statute at section 1561 (3) provides a child need not attend public school if he would attend requlary a state approved non public, (parochial or private or denominational school or even a home study school) so long as they taught subjects comparable to those taught in the public schools to children of corresponding age and grade as determined by the course of study for the public schools of the district within which the non public school is located, by certified teachers.

Nothing in the statutory requirements applicable to Defendant and her son restricts her from practicing her religious beliefs or teaching them to Brett. Nothing in the statute prohibits all home study.

The record shows there was a certified Seventh Day Adventist School available which Brett could have attended but to which Defendant refused to send him. Further available to Defendant was a six year old kindergarten program of the Adventist Elementary School in Berrien Springs. This, however, is immaterial since Defendant was and is arguing a religious belief to keep her son out of any school until she believed he was ready for it.

This statute has also been interpreted and applied to permit study at home provided there is a certified teacher and the subjects taught at home are comparable to those taught at the public schools of the district where such home study was conducted or proposed. Parents in Michigan have made use of this alternative. The Defendant did not.

The statute quoted, including the exception permitting private parochial and home education provided certified teachers are used and subjects taught in public schools are included, has been held constitutional. See *Sheridan Road Baptist Church*,

et al Department of Education, et al; 132 Mich App. 1, 348 NW 2d 263 (1984), leave to appeal denied but reconsideration granted August 31, 1984, 422 Mich 857 (1984), Supreme Court #73665, where the Michigan Court of Appeals reversed a Circuit Judge who held the teachers certification requirement and state supervision of non public schools caused "excessive governmental entanglement with religion" in violation of the First Amendment to the United States Constitution.

The record in the instant case supports the trial Court's finding that Michigan had a compelling interest in requiring that appellant's son atttend a certified school. When Defendant's personal choice is weighed against this paramount interest, absent the factors found in *Yoder,* the state prevails.

The motion to dismiss the charge against Defendant was denied by the trial judge on the basis of *Wisconsin* v. *Yoder,* 406 US 205; 92 S.Ct. 1526; 32 LEd 2d 15.

Defendant's assertions on appeal fall into three broad categories:

First, the trial court erred in not applying the test ennunicated in *Sherbert* v. *Verner,* 374 US 398; 82 S.Ct. 1790; 10 LEd 2d 965 (1983) to Plaintiff's free exercise of religion claim which Defendant says the People did not meet. Second, the compulsory education laws constitute an irrebuttable presumption, violating due process. Third, the costs assessed against Defendant were excessive in light of her trial court admitted sincere religious belief in the exercise of her constitutional right and her right to challenge a penal charge on constitutional grounds and the public interest in the case.

A constitutional right, as is freedom of religion here involved, demands the highest and best protection courts can give it. Great indeed is the burden on a state, a public or private body or anyone to prove the need or right to limit or challenge its free exercise. And when such limitation occurs there must be alternatives available to satisfy the religious and state needs and rights.

Education is the highest ranking function of state or local government. *Brown* v. *Board of Education*, 347 US 483; 74 S.Ct. 636; 98 LEd 873 (1954) (cited with approval by Justice White in *Yoder*, supra). Free exercise of religion is a fundamental value in our society. Therefore, the Court below properly relied on *Wisconsin* v. *Yoder, supra*, which involved the very delicate balance between the state's interest in compulsory education and an Amish individual's free exercise of religion claim. While *Yoder* ruled that *Wisconsin* could not compel Amish children to attend school after the eighth grade, it recognized that there could be situations where the state's compelling interest in education could limit religious expression.

Yoder, supra, and the present case both involve the balance between two highly valued competing interest; i.e., personal religious beliefs and the compelling state interest in the compulsory education of children. The cases relied upon by Defendant-Appellant do not.

In *Yoder* the U.S. Supreme Court held the Wisconsin compulsory education statute unconstitutional as it applied to children of the Old Order Amish religion.

The U.S. Supreme Court found that sending children to high school, public or private, was contrary to the Amish religion and way of life. In fact, the U.S. Supreme Court stated that sending their children to high school would not only expose the Amish to censure of the church community but would also in their belief endanger their own salvation and that of their children.

As was stated in the opinion of the Supreme Court speaking through Chief Justice Burger:

> "As a result of their common heritage, Old Order Amish communities today are characterized by a fundamental belief that salvation requires life in a church community separate and apart from the world and worldly influence. This concept of life aloof from the world and its values is central to their faith. xxx" Broadly speaking, the Old

> Order Amish religion prevails and determines the entire mode of life of its adherents. xxx. Amish objection to formal education beyond the eight [sic] grade is firmly grounded in these central religious concepts." xxx (page 22)

Under *Yoder* it must appear that the challenged state action does not deny free exercise of religion or that the state interest is of sufficient magnitude, to override the religious interest asserted, 406 US at page 214. Also see *Hanson* v. *Cushman*, 490 F.Suppl [sic] 109 (W.D. Mich. 1980)

The balance test in *Yoder*, supra, involves three factors: the belief must be sincere; the claimed religious belief and the person's mode of life must be interdependent; and the belief and the way of life must play a vital role in the survival of the practice of the religion. 406 US at 215; 32 LEd 2d at 25. The record in this appeal (except as to Defendants' sincere religious beliefs) fails to qualify under the *Yoder* tests as did the Amish in *Yoder*.

Defendant-Appellant, as noted, grounded her refusal to send her child to school on her Adventist faith in the teachings of Mrs. White.

The record below clearly establishes that not sending a six or seven year old child to a public school or to a certified private, parochial or home study school, because of alleged physical or emotional limitations of the child is not a basic tenent of faith for Adventists of the nature and degree as was true for members of the Old Order Amish religion.

Although found in Mrs. White's teachings, the belief expressed by the Defendant-Appellant is not shared by all Adventists. It is a matter of individual's conscience. It is not like the Amish in *Yoder*, supra, vital to the survival of the practice of the Seventh Day faith. Nor is the state's requiring that education commence at age 6 at a certified public or private school or home program, "understandably at odds with the fundamental tenents of the religious beliefs" of Adventists.

The record below is absent a showing that not sending an Adventist child to school at age 6 because of a parental judgment that he is not ready or could be emotionally injured was "intimately related to daily living" as was found for Amish children in *Yoder*, supra. Nor is it established here that state educational requirements "substantially interfers with the education" of Adventist children.

Defendant herself testified that there is nothing in the fundamental beliefs of the Adventist Church about teaching children at home until age 8 or 10. There is no official position of the Church on school entrance age. It is not dogma.

On the contrary, as the trial court here found, "the overwhelming majority" of the church do send their children to schools at the required age. Those who do so are not separated from or looked down by Adventists who do not.

The record is sum supports the trial court's conclusion that Defendant's belief to which she credits her Adventist faith and her way of life unlike the Amish in *Yoder*, supra, are not "vital to the survival of the Seventh Day Adventist faith" (*Yoder*) nor are the state's compulsory educational laws "undeniably at odds with the fundamental tenents of the religious beliefs" (*Yoder*) of Adventists or "substantially interfering with the religious development of Defendant-Appellant's child or Adventist children as the U.S. Supreme Court found for Amish children.

The trial Court balanced one competing interest of the state in education of its youth with the religious belief claimed by Defendant and found the balance in favor of the state. The record supports this conclusion.

The prosecutor calls attention to the recent decision (1985) of the Michigan Court of Appeals, *Wilke, et al* v. *Department of Social Services*, Court of Appeals No. 75467, decided February 25, 1985, leave to appeal denied October 9, 1985, Supreme Court No. 76137, where respondents appealed as of right a decision from a Probate Court finding their children to be

educationally neglected under MCL 380.1561(1); MSA 15.4156(1), the statues involved in the instant case.

Respondents were Seventh Day Adventists who claimed they kept their children out of either a public or Adventist school because of their preferences and beliefs resulting from their study of the Bible and the teachings of the the aforesaid Ellen G. White, their diassatisfaction with both the education done in public and Adventist schools. The respondents taught the children although neither was a certified teacher and the studies were not those comparable to that taught in public schools.

While not "on all fours" with the instant case, *Wilke* holds, after recognizing the respondent's conduct to be based on a sincere religious belief, that in religion-education controversies the balancing test to be used is that expressed in *Yoder, supra*. The trial court balanced the competing interest of the state in education with the religious belief of Defendant and found the balance in favor of the state. A study of the record here and the law concludes that this was no error.

Defendant-Appellant claims the trial court erred in applying *Yoder, supra*, rather than applying the test ennunciated in *Sherbert* v. *Verner*, 374 US 398; 83 S.Ct. 1970; 10 LEd 2d 965 (1963) to her claim of free exercise of religion. Further appellant claims that the compulsory education laws constitute an irrebuttable presumption violating due process.

Sherbert v. *Verner*, supra, which was reaffirmed in *Thomas* v. *Review Board*, 450 US 707; 101 S.Ct. 1425; 67 L.Ed.2d 624, is inapplicable because both *Verner* and *Thomas* involved denial of economic benefits to individuals because of their religious beliefs.

In *Verner*, a Seventh Day Adventist, was discharged by her employer for her refusal to work on Saturday, the Sabbath Day of her faith, and was refused unemployment compensation by the state of South Carolina because she refused to accept suitable work.

In *Thomas*, a Jehovah Witness quit his job making turrets for tanks and he was denied unemployment benefits by the State of Indiana.

In *Verner* the balance was to be made between the state's minimal interest in economic regulation against the individuals' fundamental right of free exercise of religion.

It is not therefore the *Verner* test to be used but the *Yoder* test where the balancing was between the individual's freedom of religion and the state's compelling interest in the education of its youth.

In the instant case *Yoder* is balancing oranges and oranges but to use *Verner* would be to balance apples and oranges. The government's concern with the distribution of economic benefits can not be equated with its compelling interest in youth education.

The Defendant's citation of *Delconte* v. *State*, 313 N.C. 384; 329 SE 2d 636 (N.C. 1985) is of no help here for the North Carolina Supreme Court did not have to decide the religious versus compulsory schooling issue since it found *Delconte's* home instruction program complied with the state requirements.

If this Court had the option to avoid the constitutional issue here present it certainly would avail itself of such option in disposing of this appeal but it does not.

Defendant's second assertion, that the statue constitutes an "irrebuttable presumption" in violation of due process is without merit in this case. The trial court correctly relied on the analysis set forth in *Hammond* v. *Marx*, 406 F.Supp. 853 (D.Me 1975), *Hammond* involved a claim that a state statute prohibiting children from attending first grade prior to age six constituted an unconstitutional irrebuttable presumption. The Federal District Court persuasively rejected this claim noting that the subject of age for education was in "the area of economic and social welfare legislation." This Court adopts the

Court's reasoning in *Hammond* as its own. See 406 F.Supp. at 857-858.

Further a review of the record made in the instant case supports the school attendance at age 6. Apparently 90 percent of American children are in school at age 6. There is a national basis for setting the age at six and the Michigan compulsory law in this regard does not violate due process.

The conviction is affirmed.

Defendant also asserts that the trial court imposed excessive costs in taxing her $1,000. The assessment of costs must be reasonably related to the cost of prosecution. *People* v. *Teasdale*, 335 Mich 1 (1982); *People* v. *Reuther*, 107 Mich App 349 (1981). Where a public question is involved, as it [sic] often true in a constitutional rights conflict, they are waived. In any event when challenged, the Appellate Court cannot guess at them but must find the basis for them in the record.

This Court has read the transcript of Defendant's sentencing on March 20, 1984, which indicates the trial judge was, mildly stated, personally upset over having been assigned this case and felt "its sort of like bad sauerkraut; it just keeps coming back, and back, and back". (page 2 of sentencing transcript).

There does not appear to have been any basis for setting the prosecution costs. The judge state [sic] on the record he had asked for these from the prosecutor's office and "they've furnished me nothing".

The judge assessed costs at $1,000 but again no statement of how these were computed except that costs were "enormous", and his docket, "has never, ever recovered from it, and the time this case has consumed, I probably could have disposed of a thousand other cases xxx". (page 4 of the sentencing transcript).

The judge concluded "Those costs can't be calculated in any event".

Absent any showing of costs, the assessing of $1,000 appears arbitrary and excessive especially with a $50 fine for a misde-

meanor conviction where a constitutional conflict with public interest were [sic] involved.

In his written opinion the trial judge said that Defendant "was merely a pawn of others, to facilitate the hidden agendas of other parties". Later the trial judge states in his opinion that, xxx "since this court and this case have been utilized by others, it does appear to the court that those who wish to dance, ought to be willing to pay the piper".

What is not identified is who the "others" are and why this Defendant should pay costs caused by "others". Since it was the Defendant who was sentenced, it is she who must "pay the piper". What part of the unspecified costs was caused by "others", and what part by the Defendant?

This case involved what the trial court found were sincere religious beliefs of Defendant. If the Defendant's beliefs were sincere how can those who supported her be less? Certainly a public issue was involved because of the claim of constitutional conflict between the free exercise of religion and the states' rights in compulsory education. That the conflict took so long to resolve does not change the fundamental basis of the conflict. That others who shared Defendants' religious belief and aided her defense does not change its nature either. Nor does the fact that others may benefit change it.

Admittedly cases like this one may tax judicial understanding and patience, Courts historically in the United States, however, favor the right of a citizen to express constitutional rights for in so doing liberty is preserved for all citizens. By such cases as these our constitution is clarified and strengthened; the limitations on state and individual rights defined; and, our great body of constitutional law benefited. Courts must not "chill" sincere constitutional claims and defenses by assessing heavy penalties when the claim is denied. There is ample precedent in this type of judicial proceedings not to impose costs, see, for example, the recent Michigan Court of Appeals decision in *Wilke*, supra.

As noted, supra, the trial itself was brief - less than one full day. Any costs that the prosecutor may have had would really be related to the lengthy motion to dismiss based on the constitutional issue of religious freedom.

The record is absent any itemization for the costs assessed - just a judicial guess and conclusion. The prosecutor presented no identification or amounts of cost at trial, nor has the prosecutor done so in this appeal. Perhaps this was in recognition of the constitutional and public questions involved in the motion to dismiss based on the constitutional freedom of religion guarantee.

The costs assessed below are reversed and set aside.

The sentence of $50 fine and $5 state costs is affirmed.

The Court has examined other allegations of error by the Defendant and found them meritless needing no further discussion.

No costs awarded in this appeal, a public question being involved.

The prosecutor shall forthwith prepare an appropriate order, incorporating this opinion by reference for the Court's signature.

Dated: January 17, 1986

/s/ CHESTER J. BYRNS
Chester J. Byrns
Circuit Judge

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF BERRIEN

File No. 84-740-AR-W

PEOPLE OF THE STATE OF MICHIGAN, *Plaintiff,*

v.

JUDITH WADDELL, *Defendant.*

ORDER ON APPEAL

FILED FEB 3 — 3:32 PM 1986

At A Session Of Said Court Held On The 31 Day of Jan, 1986, In The Berrien County Courthouse, City Of St. Joseph, Michigan.

PRESENT THE HONORABLE CHESTER J. BYRNS, CIRCUIT JUDGE.

An appeal having been taken from the Defendant's conviction in the Fifth District Court for the County of Berrien, briefs having been filed and arguments having been heard, and after due consideration by this Court,

IT IS DETERMINED THAT:

1. The District Court Judge correctly applied the tests of *Wisconsin* v. *Yoder,* 406 US 205; 92 S Ct 1526; 32 L Ed 2d 15 (1972) in deciding the constitutional issues in this case.

2. The District Court Judge correctly ruled, after applying the *Yoder* test, that the Defendant's constitutional rights were not violated by the state compulsory education statute, found at MCL 380.1561, formerly MCL 340.731.

3. The District Court Judge correctly ruled that the state compulsory education statute does not constitute an irrebuttable presumption, so as to violate due process.

4. The $1,000.00 cost assessment imposed by the District Court Judge was:

a. Not reasonably related to the costs of prosecution,

b. Arbitrary and excessive under the facts of this case, and

c. Absent of any itemization, and therefore improperly chilled the Defendant's right to litigate sincere constitutional claims.

d. A public question was involved.

IT IS THEREFORE ORDERED THAT:

1. This Court's written Opinion on Appeal from Fifth District Court, dated January 17, 1986, is incorporated by reference, in this Order;

2. The Defendant's conviction is AFFIRMED;

3. The Defendant's sentence of $50.00 fine and $5.00 state costs is AFFIRMED;

4. The $1,000.00 cost assessment made by the District Court is reversed and set aside; and

5. All other allegations of error made by the Defendant are DENIED.

/s/ _____
CHESTER J. BYRNS, Circuit Judge

APPROVED AS TO FORM:

_____
LEE BOOTHBY (P11000)
Attorney for Defendant

/s/ Diane Ottermann
DEPUTY COUNTY CLERK

PREPARED BY:

THOMAS K. BYERLEY (P28937)
Assistant Prosecuting Attorney

Attorney for Plaintiff

BUSINESS ADDRESS:
Office of the Prosecuting Attorney
Berrien County Courthouse
St. Joseph, MI 49085
(616) 983-7111 Ext. 311

NOTICE [PURSUANT TO MCR 2.602(B)(3)]

IF NO WRITTEN OBJECTIONS ARE FILED WITH THE COURT CLERK AFTER SERVICE OF THIS ORDER, IT WILL BE SUBMITTED TO THE COURT FOR SIGNING.

STATE OF MICHIGAN
IN THE FIFTH JUDICIAL DISTRICT COURT

District Court Case No. 5A00697

PEOPLE OF THE STATE OF MICHIGAN,
v.
JUDITH R. WADDELL, *Defendant*

OPINION

At A Session Of Said Court, Held In The Berrien County Building In The City Of St. Joseph, MI On The 1st Day Of September, 1983.

PRESENT: HON. JOHN T. HAMMOND, DISTRICT JUDGE.

Defendant's motion to dismiss must be denied. The controlling case on the constitutional issue presented here is *Wisconsin* v. *Yoder*, 406 US 205 (1972).

The factual situation in this case is decidedly in contrast to that shown in the Yoder Decision. In the Yoder case, sending the Old Order Amish children to high school was directly contrary to the Amish religion and way of life and exposed the parents to a danger of censure of the church community, endangering their own salvation and that of their children. The requirements of the state of Wisconsin were directly contrary to a *fundamental belief* of the Old Order Amish community that was *central to their* faith. Amish objection to formal education was *firmly grounded* in these *central religious concepts*.

If the school district in this case had required of its students attendance at Saturday classes, performance of a work-study program, with the emphasis on work, on Saturday, and required the students to eat pork, etc., we would then have a situation where the statute, in its enforcement on Seventh Day Adventists, would fly directly in the face of central religious concepts, and the statute would have to yield.

It is unnecessary to recite the portions of the Yoder Opinion that remind us how law-abiding and self-sufficient the Amish communities are, both because there is nothing to suggest that the Seventh Day Adventist community is any less law abiding or self sufficient, as well as the obvious fact that those characteristics are completely irrelevant in this case, as they were in the Yoder case.

By finding that the Yoder decision is the controlliong decision, rather than the 1963 case of *Sherbert* v. *Verner*, 374 US 398, I find that a *balancing of interests* test is required, rather than requiring of the state that it establish a *compelling state interest*. In fact, I do find that there is, as a matter of law, a compelling state interest in the regulation of the education of the young, a subject within the state's constitutional power to regulate. In *Brown* v. *Board of Education*, 347 US 483, at 493 (1954) the court said, "Today, education is perhaps the *most important function of state and local governments. Compulsory school attendance laws* and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. *It is required* in the performance of our *most basic* public responsibilities, even service in the armed forces. It is the *very foundation* of good citizenship. Today it is a *principal instrument* in awakening the child to cultural values, and preparing him for later professional training, and in helping him to adjust normally to his environment." (Emphasis added.)

A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations. Beliefs which are philosophical and personal, rather than religious, do not rise to the demands of the religion clause. Much of the testimony in this case had to do with whether a child of the age involved here could adequately focus, could adequately converge his eyes at a nearby object, etc.

These, and other similar arguments, based on the small stature of the child involved here, are doubtless sincere, and perhaps not without legitimate, arguable basis, but they have absolutely nothing to do with religion, which is the basis upon

which defendant's counsel seeks to require the dismissal of this action.

The cases refer to the factor of *sincerity* of religious beliefs. I take that to mean that a person who has always been of a different religion, who rushes to proclaim himself a Quaker and opposed to all wars, *only* after receiving his draft board notice, has thus amply displayed his lack of sincerity. In other words, religion ought not to be an "open sesame" to facilitate the perpetration of fraud. Nothing of that sort is involved here. The defendant has been, for many years, a devout member of the Seventh Day Adventist Church. She did not join the Seventh Day Adventist Church for the purpose of escaping from prosecution of this charge. In that sense, the sincerity of her religious beliefs is undeniable, and stipulated to by everyone. The U.S. Supreme Court, commencing at page 215 of the Yoder Opinion observed: "Although a determination of what is a 'religious' belief or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interest. Thus, if the Amish asserted their claims because of their subjective evaluation in rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis. Thoreau's choice was philosophical and personal rather than religious, and such beliefs do not rise to the demands of the religion clauses. Giving no weight to such secular considerations, however, we see that the record in this case abundantly supports the claim of the traditional way of life of the Amish and is not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living."

In contrast, in this case, though the practice of holding out from organized schooling is a "growth area" of the Seventh Day Adventist Church, it is an area that is subject to the conscience of each member of the church, and, as the proofs establish, the overwhelming majority of the members of that church *do* send

their children to school at the required age. Least [sic] anyone think that the teachings of the prophet Ellen G. White lacked validity at the time that they were uttered, one need only consider the abundant record, (starting with Charles Dickens' Salem House in "David Copperfield" as one popular source), that clearly establishes that her view of the public schools of that day was amply justified. Viewed in the light of the standards of public education at that time, it was no more and no less than excellent advice to give to any parent. While there are certainly plenty of legitimate complaints about the quality of education furnished by our public schools at this time, at least the situation no longer involves the same threat to the health and welfare of the children that was assuredly present at the time that Ellen G. White was speaking and writing.

While it thus certainly appears that the position of Judy Waddel [sic] was in accordance with, and supported by, some of the teachings of her church, it cannot be said that compulsory school attendance at age 6 is in direct conflict with a fundamental belief of the Seventh Day Adventist church which is central to that faith. If that were so, the evidence indicates that the overwhelming majority of members of the Seventh Day Adventist Church would have to be drummed out of the church. That does not seem to be happening. On the contrary, the Seventh Day Adventist Church appears to be a healthy and growing institution.

Defense counsel has made a point of suggesting that the Michigan Statute constitutes an irrebuttable presumption. That is like saying that the statute punishing murder creates an irrebuttable presumption that one shouldn't go around wantonly killing people. The court finds the reasoning in *Hammond* v. *Marx*, 406 F.Supp. 853 (1975) to be a correct statement of the law. This issue, having no validity, needs no further discussion.

So that the issues may be specifically resolved, in the event that the foregoing has not been sufficiently instructive, the court finds that the state has an overriding and compelling interest in the basic education of its citizens. The court finds that the defendant's belief against sending her child to school at

the age of six is not a fundamental belief of the Seventh Day Adventist Church, nor is it practiced by the majority of that religion. The state's interest in basic education outweighs the defendant's non-fundamental belief in delaying the formal education of her child. The Michigan Compulsory School Attendance Law, as it was in effect at that time, being MCL 340.731 and 340.732, is not unconstitutional on its face, and is not unconstitutional as applied to this defendant.

Since, as earlier observed, the proofs at trial were ample to establish the defendant's guilt, subject only to the pre-trial motion, which has now been disposed of and denied, it appears that this court has no alternative but to find the defendant, Judy Waddel, guilty as charged of the offense charged against her. It is unfortunate that for purposes of finding a case upon which to litigate this issue, it appears that the defendant, Judy Waddel, has been merely a pawn of others, to facilitate the hidden agendas of other parties. For that reason, it does not appear to the court that it would be at all appropriate to impose upon this defendant any sort of mandatory jail sentence. Neither does the court intend to impose an exorbitant fine, under the circumstances of this case. However, since this court and this case have been utilized by others, to serve their interests, it does appear to the court that those who wish to dance, ought to be willing to pay the piper. For this reason, the court requests that the prosecuting attorney be prepared to brief the court, and defense counsel, and argue in open court, his position concerning the amount of costs which can, or should, or both, be legitimately assessed under the circumstances of this case.

/s/ JOHN T. HAMMOND
John T. Hammond
District Court Judge

STATE OF MICHIGAN
IN THE FIFTH DISTRICT COURT IN AND
FOR THE COUNTY OF BERRIEN

File No. 5A00697

PEOPLE OF THE STATE OF MICHIGAN, *Plaintiff,*

v.

JUDITH R. WADDELL, *Defendant.*

ORDER DENYING DEFENDANT'S MOTION TO DISMISS

At A Session Of Said Court Held On The 1st Day Of September, 1983, In The Berrien County Courthouse, City Of St. Joseph, Michigan.

PRESENT: THE HONORABLE JOHN T. HAMMOND, DISTRICT JUDGE

This matter having come on for bench trial on defendant's alleged violation of MCLA 340.731, MSA 15.3731 and defendant having filed a Motion to Dismiss that charge and testimony having been taken on the principal charge and briefs having been filed by the respective parties, and oral arguments having been heard and the Court being fully advised in the premises;

IT IS HEREBY ORDERED that defendant's Motion to Dismiss is DENIED for the reasons stated in the written opinion of the Court dated September 1, 1983, which are incorporated herein by reference.

IT IS FURTHER ORDERED that for the reasons outlined in the above-referenced opinion of the Court and its oral findings of September 30, 1975, it is the determination of this Court that defendant is guilty beyond a reasonable doubt of violating

MCLA 340.731, MSA 15.3731 as charged in the complaint herein.

IT IS FURTHER ORDERED that the Prosecuting Attorney shall prepare and present to this Court a proposed bill of costs to be taxed against defendant in accordance with the opinion of the Court referenced above.

/s/ JOHN T. HAMMOND
John T. Hammond
Fifth District Judge

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 10th day of February in the year of our Lord one thousand nine hundred and eight-seven.

79403

Present the Honorable
DOROTHY COMSTOCK RILEY,
Chief Justice

CHARLES L. LEVIN,
JAMES H. BRICKLEY,
MICHAEL F. CAVANAGH,
PATRICIA J. BOYLE,
DENNIS W. ARCHER,
ROBERT P. GRIFFIN,
Associate Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v.

JUDITH WADDELL, *Defendant-Appellant.*

SC: 79403
COA: 90821
LC: 84-740-AR

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

AT A SESSION OF THE COURT OF APPEALS OF THE STATE OF MICHIGAN, Held at the Court of Appeals in the City of Detroit, on the 18th day of August in the year of our Lord one thousand nine hundred and eight-six.

Present the Honorable
RICHARD M. MAHER
Presiding Judge
MYRON H. WAHLS
ROMAN S. GRIBBS
Judges

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v.

JUDITH WADDELL, *Defendant-Appellant.*

No. 90821
L.C. No. 84-740-AR-W

In this cause an application for leave to appeal is filed by defendant-appellant, and an answer in opposition thereto having been filed, and due consideration thereof having been had by the Court,

IT IS ORDERED that the application be, and the same is hereby DENIED for lack of merit in the grounds presented, for the reasons stated in the opinion of the learned circuit judge.

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF BERRIEN

District Court No. 5A00697-H

Circuit Court No. 84-740-AR-W

PEOPLE OF THE STATE OF MICHIGAN, *Plaintiffs-Appellees*,

v.

JUDITH R. WADDELL, *Defendant-Appellant.*

FILED May 7, 1987
Diane Radewald
Berrien County Clerk

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Judy Waddell, a/k/a Judith Waddell, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final order on appeal of the Circuit Court for the County of Berrien, affirming the judgment of conviction, entered herein on January 31, 1986. Said conviction and sentence was entered by the Fifth Judicial District Court on March 20, 1984.

This appeal it taken pursuant to 28 U.S.C. § 1257(2)

/s/ LEE BOOTHBY
Lee Boothby P11000
208 W. Mars Street
Berrien Springs, MI 49103
(616) 471-7787
Counsel for Defendant-Appellant Judy Waddell

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF BERRIEN

District Court No. 5A00697-H

Circuit Court No. 84-740-AR-W

PEOPLE OF THE STATE OF MICHIGAN, *Plaintiffs-Appellees*,

v.

JUDITH R. WADDELL, *Defendant-Appellant.*

FILED May 7, 1981
Diane Radewald, Berrien County Clerk

CERTIFICATE OF SERVICE

I hereby certify that all parties required to be served have been served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States by Hand Delivery this 7th day of May, 1987, upon the following:

Prosecuting Attorney
Office of the Prosecuting Attorney
Berrien County Courthouse, St. Joseph, MI 49085
Fifth District Court Clerk
Fifth District Court
Berrien County Courthouse, St. Joseph, MI 49085
Berrien County Circuit Court Clerk
Berrien County Circuit Court
Berrien County Courthouse, St. Joseph, MI 49085

/s/ ROBERT A. YINGST
Robert A. Yingst P22624
208 W. Mars Street
Berrien Springs, MI 49103
(616) 471-7787
Counsel for Defendant-Appellant Judy Waddell

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF BERRIEN

District Court No. 5A00697-H

Circuit Court No. 84-740-AR-W

PEOPLE OF THE STATE OF MICHIGAN, *Plaintiffs-Appellees*,

v.

JUDITH R. WADDELL, *Defendant-Appellant.*

FILED May 7, 1987
5th District Court
St. Joseph, Michigan

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Judy Waddel, a/k/a Judith Waddell, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final order on appeal of the Circuit Court for the County of Berrien, affirming the judgment of conviction, entered herein on January 31, 1986. Said conviction and sentence was entered by the Fifth Judicial District Court on March 20, 1984.

This appeal it taken pursuant to 28 U.S.C. § 1257(2)

/s/ LEE BOOTHBY
Lee Boothby P11000
208 W. Mars Street
Berrien Springs, MI 49103
(616) 471-7787
Counsel for Defendant-Appellant Judy Waddell

STATE OF MICHIGAN
IN THE DISTRICT COURT, FIFTH JUDICIAL DISTRICT

Case No. 5 A 00697

PEOPLE OF THE STATE OF MICHIGAN, *Plaintiffs*,

v.

JUDITH R. WADDELL, *Defendant*.

SECOND AMENDED MOTION TO DISMISS AND RESPONSE TO THE PEOPLE'S MOTION FOR MORE DEFINITE STATEMENT

Now comes Judy Waddell, the above named Defendant, by Lee Boothby her attorney and in response to the People's Motion for More Definite Statement and as a Second Amended Motion to Dismiss says:

1. Defendant claims that she deferred the sending of her child, Brett Waddell, to school because of deeply held sincere religious convictions.

2. Defendant further claims that the provisions of the Michigan Compulsory School Attendance Law, that being Sections 731 and 732 of the School Code of 1955, as amended (MSA 15.3731-15.3732; MCLA 340.731-340.732) are unconstitutional as applied to said Defendant and violate certain rights guaranteed to Defendant by the first and fourteenth amendments to the United States Constitution.

3. In this regard Defendant claims that said law imposes a burden on the free exercise of her religious convictions.

4. Defendant admits that the state has a substantial interest in providing some degree of education to prepare citizens to participate in society. Defendant, however, contends that the state's interest is not of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause of

the first amendment. Defendant claims that the People have the burden of proof on this issue.

5. Defendant further claims that the People must prove that enforcement of the school attendance law against Defendant, by requiring the child to be in school last year, was the sole method by which the government could attain its goals.

6. Defendant further claims that the People must prove that an exemption or accomodation for Defendant's religious scruples would, in fact, impair the governmental interest.

7. Defendant further claims that the People must prove that no viable alternative existed to accomodate Defendant's religious convictions.

8. The Defendant claims that her child, Brett Waddell, was physically and emotionally immature and not ready for school last year and during the time period for which she is here charged.

9. That further Defendant claims that it was her religious belief that the mother has the responsibility of being the child's first teacher; that the mother should continue to be the only teacher during the early years; that in determining when the child should start school the parent is required to take into consideration the physical, emotional and mental maturation and development of the child; that further the mother should continue to be the only teacher when maturation and development is delayed.

10. That the Defendant did in fact provide the child with religious, moral and educational instruction in her home during this period.

11. That the Defendant was not attempting to withhold the child from all formal schooling but merely delaying entering the child into school.

12. Defendant claims that the state must prove that her decision to keep the child out of school was contrary to the interests of the child or the goals of the state.

13. That further the said provisions of the School Code deprive said Defendant of religious liberty and the free exercise of her religion as guaranteed by Section 2 and 4 of Article I of the Michigan Constitution of 1963; and

14. That the provision of Section 732 of the School Code as amended (MCLA 340.732) and the Act 242 of the Public Acts of 1970 (MCLA 388.391-388.393) which contain certain very limited exemptions to the compulsory school attendance law unconstitutionally discriminate against Defendant; that further it is violative of the provisions of Sec. 2 of Article I of the Michigan Constitution of 1963 and the First and Fourteenth Amendments to the United States Constitution.

15. That further Section 731 and 732 of the School Code of 1955, as amended, (MCLA 340.731-340.732) which requires that every parent having control and charge of any child between ages 6 and 16 years send such child to school (Sec. 731(a)) and which further mandates that "a child becoming 6 years of age before December 1 shall be enrolled on the first day of the school year in which his sixth birthday occurs" (Sec. 731(b)), amounts to and has the effect of a conclusive or irrebuttable presumption which is violative of and constitutionally impermissible under the Due Process Clause of the Fifth and Fourteenth Amendments of the United States Constitution and the teachings of *Vlandis* v. *Kline*, 93 S.Ct. 2230; *Stanley* v. *Illinois*, 92 S.Ct. 1208 and *Board of Education* v. *La Fluer*, 94 S.Ct. 791.

16. That the said school attendance statute, in effect, contain an irrebuttable presumption that all children (other than pages or messengers in the legislature and children under nine who reside within 2 1/2 miles by the nearest road to some public school unless transportation is furnished) are "ready" to be sent to school at age 6, and that this presumption applies even if there is medical and/or other evidence that the child is physically, emotionally or mentally too immature to be than sent to school.

17. And/or in the alternative that said statute, in effect, contains an irrebuttable presumption that the chronological age of six is always and solely determinative as to when a child has reached that point of emotional, physical and mental maturity to require that he be sent to school in spite of evidence to the contrary.

18 And/or in the alternative that said statute, in effect, contains an irrebuttable presumption that the interests of the state in providing a sufficient degree of education to prepare citizens to participate in society require that a child, in all cases, be sent to school.

19. And/or in the alternative that the said statute, in effect, contains an irrebuttable presumption that the goals of the state can never be met through an educational process using a non-certified teacher parent operating within the home, even when there is evidence to the contrary.

20. That further because of the foregoing the Fourteenth Amendment to the United States Constitution requires that the state employ alternate administrative means which do not so broadly infringe upon Defendant's basic constitutional rights.

21. That the mandatory school attendance age is not based upon or supported by any emperical evidence and because of this and the reasons above stated the said statute is arbitrary and unreasonable and has no rational relationship to a valid state interest.

WHEREFORE, Defendant prays:

1. That Section 731 and 732 of the School Code of 1955 be determined bo be unconstitutional and that the Complaint and Warrant be dismissed; or in the alternative

2. That Section 731 and 732 of the School Code of 1955 as amended be determined to be unconstitutional as applied to this Defendant and that the Complaint and Warrant be dis-

missed.

Dated: February 16, 1976

/s/ LEE BOOTHBY
Lee Boothby, Attorney for Defendant
Business Address: 1310 St. Joseph Road
Berrien Springs, Michigan 49103
Phone: (616) 471-7787

STATE OF MICHIGAN
IN THE DISTRICT COURT, 5TH JUDICIAL DISTRICT

File No. 5A00697 H

THE PEOPLE OF THE STATE OF MICHIGAN,

v.

JUDY WADDELL, *Defendant*

PEOPLE'S MOTION FOR DENIAL OF DEFENDANT'S MOTION TO DISMISS

Now come the People of the State of Michigan, by their Attorney, John C. Bruha, Assistant Prosecuting Attorney for the County of Berrien, and, following completion of defendant's proofs in support of her motion to dismiss the criminal complaint in the above cause, move this Honorable Court to deny defendant's motion, and in support thereof state as follows:

1. Defendant has failed to show that the Michigan Compulsory Education Law infringes upon the practice of her religion. The evidence has indicated that defendant is a member of the Seventh Day Adventist faith; that sending a child to school in compliance with the compulsory attendance requirements does not violate a fundamental belief of that religion (on the contrary, the proofs show that the vast majority of Seventh Day Adventist parents comply with compulsory attendance requirements); and that defendant's reasons for withholding her child from school do not meet the test for constitutional protection established by *Wisconsin* v. *Yoder*, 406 US 205, 32 L Ed 2d 15, 92 S Ct 1526 (1972). While defendant's beliefs may be sincere, they are not shared by an organized group and intimately related to daily living; the belief and defendant's way of life are not inseparable and interdependent; and the belief does not play a vital role in the survival of defendant's religion.

2. Defendant has failed to establish an interest which outweighs the state's admittedly strong interest, as a matter of law, in basic education. *Wisconsin* v. *Yoder*, 406 US 205, 32 L Ed 2d 15, 92 S Ct 1526 (1972); *San Antonio School District* v. *Rodriguez*, 411 US 1, 36 L Ed 2d 16, 93 S Ct 1278 (1973); *Brown* v. *Board of Education*, 347 US 483, 98 L Ed 873, 74 S Ct 686 (1954); *Governor* v. *State Treasurer*, 389 Mich 1 (1972), *vacated on other grounds*, 390 Mich 389 (1973).

3. Defendant's proposed alternative, home instruction, is inadequate since defendant is not a certified teacher.

4. The state already offers defendant adequate alternatives which accommodate both the state's interest and defendant's religious beliefs: (1) attendance at a Seventh Day Adventist School; (2) opportunity for home instruction upon obtaining teacher certification (see Memorandum Opinion of the Attorney General, No. M-567, May 18, 1961); and (3) home instruction by a legally qualified tutor.

WHEREFORE, the People pray that Defendant's Motion to Dismiss be denied.

/s JOHN C. BRUHA
John C. Bruha
Assistant Prosecuting Attorney
BUSINESS ADDRESS:
Berrien County Courthouse
St. Joseph, Michigan 49085

DATED: February 4, 1976

STATE OF MICHIGAN

IN THE DISTRICT COURT, FIFTH JUDICIAL DISTRICT

Case No. 5A00697

PEOPLE OF THE STATE OF MICHIGAN,

v.

JUDY WADDELL, *Defendant.*

RESPONSE TO PEOPLE'S MOTION FOR DENIAL OF DEFENDANT'S MOTION TO DISMISS

Now comes Judy Wadell, the above named Defendant, by Lee Boothby her attorney and in Response to "People's Motion for Denial of Defendant's Motion To Dismiss" says:

1. Defendant contends that she deferred the sending of her son to school because of deeply held sincere religious convictions. Not only has Defendant made out a prima facie case in this regard but moreover witnesses for the People admit this to be the case.

2. Defendant has demonstrated that the Michigan compulsory school attendance laws under which Defendant is now being prosecuted impose a burden on the free excercise of her religious convictions. (See testimony of Defendant, Elder Adams and Dr. Young.)

3. The Defendant admits that the state has a substantial interest in providing some degree of education to prepare citizens to participate in society. However Defendant contends that the state's interest has not yet been demonstrated to be "of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause." *Wisconsin* v. *Yoder*, 406 US 205 at 214; that further the burden of proof concerning the state interest rests with the People (Tr. p. 5).

4. Defendant has met any burden she may have of going forward with the evidence concerning the issue of whether requiring a seven (7) year old child to be in school is the sole method by which the government may attain its goals (although Defendant denies that she even has the burden of going forward with the evidence on this issue). (See testimony of Dr. Halliwell, Dr. Erickson, Dr. Young, August Steinhilber, and statutes of other states.) The People have the burden of proof on this issue (Tr. p. 5 & 6).

5. Defendant has met any burden she may have of going forward with the evidence concerning the issue of whether an exemption for Defendant's religious scruples would, in fact, impair the governmental interest although here also Defendant denies that she even has the burden of going forward with the evidence). (See testimony of Dr. Halliwell, Dr. Erickson, Dr. Young, August Steinhilber, and statutes of other states.) The People have the burden of proof on this issue (Tr. p. 6).

6. Defendant has submitted testimony from an officially designated representative of the Seventh-day Adventist Church authorized by the general church headquarters to testify in this case. This witness testified:

(a) The Seventh-day Adventist Church teaches that the writings of Ellen G. White (one of the founders of the Seventh-day Adventist Church) amplify and make clearer the teachings of the Bible. The Church believes that these writings are inspired by God and are to be followed by the members of the Church.

(b) The acceptance of the writings of Ellen White as fundamental teachings of the Church is historic in the Church.

(c) These teachings set forth certain basic principles concerning the obligation of a parent and particularly that of a mother in the education of a child.

(d) These same church teachings place upon the mother the responsibility of being the child's first teacher and instruct

the parent concerning the educational process. (See "Exhibit N")

(e) The church teachings also direct that the parent not send their child to school at too early an age. In this regard the parent is directed to take into consideration the physical, emotional and mental maturation and development of the child. The Church teaches that the mother should continue to be the only teacher of the child when maturation and development of the child is delayed.

(f) The church teachings are not directed toward withholding a child from all formal schooling but merely delaying entering the child into school. For this reason the Church operates an extensive educational program and strongly urges its full use.

(g) The aforesaid teachings of the Church concerning delay in early school attendance are an historic teaching of the Church recognized by Church leaders.

(h) The Church teaches that the violation of ones religious convictions, as gained from the study of the Bible and the amplification of God's word as set forth in the writings of Ellen G. White, constitutes sin and places that individual in jeopardy of losing his or her eternal life.

7. Although it is irrelevant to the issue before the Court, Defendant denies that it has been established that the "vast majority of Seventh-day Adventist parents comply with compulsory attendance requirements."

8. Deny that Defendant's reasons for withholding her child from school do not meet with the test for constitutional protection.

9. Deny that Defendant's beliefs are not shared by an organized group and intimately related to daily living but show that the free exercise of religion guaranteed to Defendant under the State and Federal Constitutions are not predicated

upon any requirement that the free exercise be only protected if "shared by an organized group." First Amendment rights are primarily individual. Such a requirement as People seek to impose would itself be unconstitutional. See *United States* v. *Seeger*, 380 US 163 (1965); *Welsh* v. *United States*, 398 US 333 (1970). The recitation of Amish tradition in *Yoder* was not set forth in the Court's opinion because the existence of such tradition was viewed as *Sine qua non* for a religious exemption. The *Yoder* decision must be read in conjunction with *Sherbert* v. *Verner*, 374 US 398 (1963).

10. The People have the burden of demonstrating that no viable alternative existed to accommodate Defendant's religious convictions. The People have not demonstrated that the goals of the state will not be met by this Defendant. The viable accommodation does not require the use of a "certified teacher" (See *Yoder* where non-certified teachers ie. parents were the only teachers); Defendant further denies that the People offered any alternatives to accommodate Defendant's religious convictions.

11. It is the Defendant's specific religious convictions for which an accommodation must be sought by the state. The sincerity of her conviction has been admitted (Tr. p. 17). The validity of what Defendant believes can not be questioned by this Court. *Seeger*, 380 US at 186.

12. Defendant has made a prima facie showing that the child was physically and emotionally immature and not ready for school last year. (Tr. p. 220).

13. Defendant has further made a prima facie showing that her decision to keep the child out of school last year was not contrary to the interests of the child or the goals of the state. (See testimony of Dr. Van Duinen.)

14. Defendant has further made a prima facie showing that Section 731 and 732 of the School Code of 1955, as amended, (MCLA 340.731-340.732) which requires that every parent having control and charge of any child between ages 6 and 16

years send such child to school (Sec. 731(a)) and which further mandates that "a child becoming 6 years of age before December 1 shall be enrolled on the first day of the school year in which his sixth birthday occurs" (Sec. 731(b)), amounts to and has the effect of a conclusive or irrebuttable presumption which is violative of and constitutionally impermissible under the Due Process Clause of the Fifth and Fourteenth Amendments of the United States Constitution. Expert witnesses have testified that all children are not ready for school by age 6 or age 7 and that flexibility is not only desirable but necessary and in the best interest of the child. A prima facie showing has been made that an exception to the rigid application of compulsory school attendance law is administratively feasible and would still meet the goals of the state.

15. Because the issues raised in Defendant's Motion present new and substantial constitutional questions which may have an impact on the jurisprudence of this state and because the testimony has not yet been fully transcribed, it is requested that no decision relative to Defendant's Motion be made until a full transcript is available. Defendant further requests a reasonable time thereafter to submit a full brief on the questions of law and fact presented in this case.

WHEREFORE, Defendant prays that the People's Motion be denied.

Dated: February 16, 1976

/s/ LEE BOOTHBY
Lee Boothby
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CONSTITUTIONAL PROVISIONS

AMENDMENT 1

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT 14

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privilieges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS

Michigan School Code of 1955, §§ 731 and 732; M.C.L. §§ 340.731 and 340.732; M.S.A. §§ 15.3731 and 15.3732 (now substantively unchanged but reenacted as a single section in the Michigan School Code of 1976 by 1976 P.A. 451, § 1561; M.C.L. § 380.1561; M.S.A. § 15.41561 which is reprinted in its present form below the former § 731 and § 732).

Sec 731. (a) Except as provided in section 732 and subject to the provisions of subsection (b), every parent, guardian or other person in this state, having control and charge of any child between the proper ages of 6 and 16 years, shall send such child, equipped with the proper textbooks necessary to pursue his school year, and such attendance shall be continuous and consecutive for the school years fixed by the district in which such child is enrolled. In school districts which maintain school during the entire year and in which the school year is divided into quarters, no child shall be compelled to attend the public schools more than 3 quarters in any one year; but a child shall not be absent for any 2 consecutive quarters.

(b) A child becoming 6 years of age before December 1 shall be enrolled on the first school day of the school year in which his sixth birthday occurs. A child becoming 6 years of age on or after December 1 shall be enrolled on the first school day of the school year following the school year in which his sixth birthday occurs.

Sec. 732. In the following cases, children shall not be required to attend the public schools:

(a) Private, parochial, or denominational school. Any child who is attending regularly and is being taught in a private, parochial or denominational school which has complied with all the provisions of this act and teaches subjects comparable to those taught in the public schhols to children of corresponding age and grade, as determined by the course of study for the public schools of the district within which such private, denominational or parochial school is located.

(b) Page or messenger in legislature. Any child who is regularly employed as a page or messenger in either branch of the legislature during the period of such employment.

(c) Children under 9, distance from school; exceptions. Children under 9 years of age who do not reside within 2 1/2 miles, by the nearest traveled road, of some public school. If transportation is furnished for pupils in the district, this exemption shall not apply.

(d) Confirmation classes, attendance. Any child 12 to 14 years of age while in attendance at confirmation classes conducted for a period of not to exceed 5 months in either of the years.

(e) Religious instruction classes off public school property. Any child who is regularly enrolled in the public schools while in attendance at religious instruction classes for not more than 2 class hours per week, off public school property during public school hours upon written request of the parent, guardian or person in loco parentis in accordance with rules prescribed by the superintendent of public instruction.

Michigan School Code of 1976, § 1561; M.C.L. § 380.1561; M.S.A. § 15.41561 (formerly §§ 731 and 732 of the Michigan School Code of 1955).

Sec. 1561. (1) Except as provided in subsection (2) and (3), every parent guardian, or other person in this state having control and charge of a child from the age of 6 to the child's sixteenth birthday, shall send that child to the public schools during the entire school year. The child's attendance shall be continous and consecutive for the school year fixed by the school district in which the child is enrolled. In a school district which maintains school during the entire calendar year and in which the school year is divided into quarters, a child shall not be compelled to attend the public school more than 3 quarters in 1 calendar year, but a child shall not be absent for 2 consecutive quarters.

(2) A child becoming 6 years of age before December 1 shall be enrolled on the first school day of the school year in which the child's sixth birthday occurs. A child becoming 6 years of age on or after December 1 shall be enrolled on the first school day of the school year following the school year in which the child's sixth birthday occurs.

(3) A child shall not be required to attend the public schools in the following cases:

(a) A child who is attending regularly and is being taught in a state approved nonpublic school, which teaches subjects comparable to those taught in the public schools to children of corresponding age and grade, as determined by the course of study for the public schools of the district within which the nonpublic school is located.

(b) A child who is regularly employed as a page or messenger in either house of the legislature during the period of the employment.

(c) A child under 9 years of age who does not reside within 2 1/2 miles by the nearest traveled road of a public school. If transportation is furnished for pupils in the school district of the child's residence, this exemption does not apply.

(d) A child from the age of 12 to the child's fourteenth birthday while in attendance at confirmation classes conducted for a period of not to exceed 5 months in either of those years.

(e) A child who is regularly enrolled in the public schools while in attendance at religious instruction classes for not more than 2 class hours per week, off public school property during public school hours, upon written request of the parent guardian, or person in loco parent's under rules promulgated by the state board.

TABLE

COMPULSORY SCHOOL ATTENDANCE AGE LIMITS: FIFTY STATES INCLUDING THE DISTRICT OF COLUMBIA AND PUERTO RICO

SELECTED YEARS FROM 1887 TO 1972

State	1887[1]	—1915[1]	1935[1]	1959[1]	1965[1]	1972[2]
Alabama	...	...	7-16	7-16	7-16	7-16
Alaska	...	...	7-16	7-16	7-16	7-16
Arizona	...	8-16	8-16	8-16	8-16	8-16
Arkansas	...	8-20	7-16	7-16	7-16	7-16
California	8-14	7-15	8-16	8-16	8-16	6-18
Colorado	...	8-16	8-16	8-16	7-16	7-16
Connecticut	8-16	7-16	7-16	7-16	7-16	7-16
Delaware	...	7-14	7-17	7-16	7-16	6-16
District of Columbia	8-14	8-14	7-16	7-16	7-16	7-16
Florida	...	...	7-16	7-16	7-16	7-16
Georgia	...	...	8-14	7-16	7-16	7-16
Hawaii	...	6-15	6-14	6-16	6-16	6-18
Idaho	8-14	8-18	8-18	7-16	7-16	7-16
Illinois	7-14	7-16	7-16	7-16	7-16	7-16
Indiana	...	7-16	7-16	7-16	7-16	7-16
Iowa	...	7-16	7-16	7-16	7-16	7-16
Kansas	8-14	8-15	7-16	7-16	7-16	7-16
Kentucky	...	7-16	7-16	7-16	7-16	7-16
Louisiana	...	8-16	7-14	7-16	7-16	7-16
Maine	8-15	7-15	7-16	7-16	7-17	7-17
Maryland	...	8-16	7-16	7-16	7-16	6-16
Massachusetts	8-14	7-16	7-16	7-16	7-16	6-16
Michigan	8-14	7-16	7-16	6-16	6-16	6-16
Minnesota	8-16	8-16	8-16	7-16	7-16	7-16
Mississippi	...	...	7-17	...	...	...
Missouri	...	8-16	7-16	7-16	7-16	7-16
Montana	8-14	8-16	8-16	7-16	7-16	7-16
Nebraska	8-14	7-15	7-16	7-16	7-16	7-16
Nevada	8-14	8-16	7-18	7-17	7-17	7-17
New Hampshire	6-16	8-16	8-16	6-16	6-16	6-16
New Jersey	7-16	7-16	7-16	7-16	6-16	6-16
New Mexico	...	7-14	6-17	6-17	6-17	6-17
New York	8-14	8-16	7-16	7-16	7-16	6-16
North Carolina	...	8-12	7-14	7-16	7-16	7-16
North Dakota	10-14	8-15	7-17	7-16	7-16	7-16
Ohio	8-16	8-16	6-18	6-18	6-18	6-18
Oklahoma	...	8-16	8-18	7-18	7-18	7-18
Oregon	...	9-15	8-16	7-18	7-18	7-18
Pennsylvania	...	8-16	8-16	8-17	8-17	8-17
Puerto Rico	...	8-14	8-14	8-14	8-16	8-14
Rhode Island	7-15	7-15	7-16	7-16	7-16	7-16
South Carolina	...	...	8-14	...	...	7-16
South Dakota	10-14	8-14	8-17	7-16	7-16	7-16
Tennessee	...	8-16	7-17	7-17	7-17	7-17
Texas	...	...	7-16	7-16	7-17	7-17
Utah	...	8-16	8-18	6-18	6-18	6-18
Vermont	8-14	8-16	8-16	7-16	7-16	7-16
Virginia	...	8-12	7-15	7-16	7-16	36-17
Washington	8-18	8-16	8-16	8-16	8-16	8-18
West Virginia	...	8-15	7-16	7-16	7-16	7-16
Wisconsin	7-15	7-16	7-16	7-16	7-16	7-16
Wyoming	7-16	7-14	7-16	7-16	7-17	7-16

[1]August W. Steinhilber and Carl J. Sokolowski, *State Law on Compulsory Attendance* (Washington: U.S. Government Printing Office, 1966). U.S. Office of Education Circular No. 793.

[2]SOURCE: Analysis of statutes from individual states.

[3]If law is adopted locally.

NOTE: Where there is no entry, a state had no compulsory attendance law for the year reported. The laws typically permit exemptions for children within the age ranges for several reasons, such as completion of certain grades or, under certain conditions, employment.